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JUL 20 1966
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 375

R. GORDON LEVI, - - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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No. _____

R. GORDON LEVI, - - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

R. Gordon Levi, defendant in a criminal action prosecuted in the State Courts in the Commonwealth of Kentucky, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered on April 22, 1966.

OPINIONS BELOW.

The Circuit Court of Harrison County, Kentucky, rendered no opinion. The original opinion of the Court of Appeals of Kentucky rendered on October 15, 1965, affirming, and its opinion rendered on April 22, 1966, overruling petitioner's petition for a rehearing have

not yet been officially reported. The mandate of the Court of Appeals of Kentucky issued on April 22, 1966. A copy of said opinions and the mandate are appended hereto on pages _____.

JURISDICTION.

The final judgment of the Court of Appeals of Kentucky was rendered on April 22, 1966, and the mandate issued on that same date. Copies are attached as indicated in the foregoing section.

No extension of time for filing this petition for writ of certiorari has been obtained and it is filed within the ninety days prescribed by Rule 22 of the Rules of the United States Supreme Court.

The jurisdiction of the Court is invoked under Title 28, Section 1257 (Sub-Section 3).

QUESTIONS PRESENTED.

After the jury received their instructions from the Court they retired for deliberation in the custody of the Harrison County Sheriff, C. C. Hall.

Sheriff Hall was a prosecuting witness against the defendant and his testimony was highly prejudicial to the defendant (T. 63-68). About one hour after the jury had retired for deliberations, Sheriff Hall knocked on the door of the judge's chambers. In chambers with the judge when Sheriff Hall knocked on the door with a question from the jury room were Commonwealth At-

torney, G. L. Tucker; County Attorney, John M. Keith; and defense counsel, John Y. Brown and Royce C. Pulliam. The petitioner had remained at the defense counsel table in the Court Room.

The question from the jury written on the paper related to the time petitioner would have to stay in prison if the jury returned a verdict of 2 years, 5 years, 10 years or 21 years. It was agreed that the judge could not answer the questions. The judge returned the note to the jury by the Sheriff with: "This is strictly a matter for the parole board and is not the concern of the jury." The Sheriff left the chambers and returned the paper to the jury alone (HOMFNT 2-4).

About three weeks after the trial, Royce Pulliam, counsel for petitioner, overheard a conversation between two citizens of the community where the trial had taken place regarding petit juror Herman McClanahan. When questioned by Mr. Pulliam, both citizens stated that prior to the trial juror McClanahan had stated in their presence, "I don't know about his guilt but if I was on the jury I would send him (petitioner Gordon Levi) to prison for things he has done in the past" (HOMFNT, 8).

QUESTION I.

Whether It Was a Denial of Petitioner's Right to a Trial by an Impartial Jury and the Denial of Due Process of Law to Be Tried by a Juror Who Harbored a Secret Bias and Prejudice Against the Petitioner, Such Bias and Prejudice Not Having Been Discovered Until After the Trial For Murder of Petitioner, the Penalty For Which Is Death or Life in the Penitentiary.

QUESTION II.

Whether It Was a Denial of Petitioner's Right to a Fair and Impartial Trial and the Denial of Due Process of Law For the Jury to Be Placed in the Custody of a Sheriff Who Had Been a Prosecuting Witness Against Petitioner, and Who Acted as a Courier For Communication Between the Jury and Judge While the Jury Was Retired in Deliberations.

QUESTION III.

Whether It Was a Denial of Petitioner's Right to Be Present at Every State of His Trial and a Denial of Due Process of Law For the Trial Judge to Respond to a Question Submitted by the Jury to the Court Without Calling the Jury Into the Open Court Room So That the Question Could Be Answered in the Presence of Petitioner.

The sections of the Constitution of the United States involved are:

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, . . . nor be de-

prived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VI.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

AMENDMENT XIV.

Section I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

The essential facts concerning the issues as raised by the petitioner herein are not in dispute. The petitioner was called by the Harrison Circuit Court to stand trial on his indictment for murder, on May 24, 1964.

After all the evidence had been presented and the jury had retired for deliberation, the Sheriff was presented with a piece of paper which contained a question for the Court concerning when the petitioner would be eligible for parole if various sentences were imposed.

The Court in its response stated, "This is strictly a matter for the parole board. You are not to consider it in any way." This response was written on the sheet of paper and handed to the Sheriff in the chambers of the Court in the presence of the Commonwealth Attorney, the County Attorney and counsel for defense. The petitioner was seated in the court room and not in the presence of the Court when the response was made.

Some two or three weeks after the trial, counsel for defense overheard D. R. Johnson and Eddie Florence talking in Johnson's furniture store about the qualifications of petit juror Herman McClanahan. Petit Juror McClanahan had told Mr. Johnson, a member of the Grand Jury that indicted petitioner for murder, that he, McClanahan, would send petitioner to the penitentiary for things petitioner had done in the past and he did not care about the guilt or innocence of petitioner.

Subsequently McClanahan was chosen to sit on the jury that found petitioner guilty of voluntary manslaughter and sentenced him to fifteen years in the penitentiary.

Upon *voir dire* examination McClanahan stated he had already made up his mind as to the guilt of petitioner. He further stated it would take evidence to remove it from his mind. Mr. McClanahan then stated he could forget his opinion and try the case strictly on the evidence (VD—Qs. 8-10, EXHIBIT C).

Mr. McClanahan then said that if no evidence was presented at all he could *not* say the defendant was "not guilty."

Petitioner has preserved all federal questions by making timely objections.

At the hearing on motion for new trial the juror in issue, Mr. McClanahan, repeatedly refused to answer directly whether he had made the statement purported to him by the testimony of D. R. Johnson and Eddie Florence (HOMFNT 20).

The Court refused petitioner's motion for a new trial and on appeal the Court of Appeals of Kentucky affirmed.

In its opinion rendered October 15, 1965, affirming the conviction, the Court touched on both issues only in passing and failed to discuss the substantial issue involved.

In refusing to reverse the trial court the Court of Appeals declared the communication between the Court and jury as not a "substantial proceeding" within the meaning of the law entitling defendant to be present at every state of the proceedings.

The Court, in considering the bias and prejudice of the juror, dismisses the question because the objection to the juror was not timely made. Also, the juror swore he could disregard his opinion and require the Commonwealth to prove its case beyond a reasonable doubt. The real issue was never met and that is whether the statement made by the juror, Mr. McClanahan, indicated such a bias and prejudice as to deny petitioner his right to a fair and impartial trial. The objection was timely made upon the discovery of the statement having been made. The statement was made prior to the trial and conclusively establishes such bias and prejudice as to make the question one of law and not of fact.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals of Kentucky should be reviewed because that Court has decided a Federal question of substance involving the due processes of law and the Constitution of the United States which has not heretofore been determined by this Court. The Court of Appeals of Kentucky has decided it in a way not in accordance with the applicable decisions of other Federal Courts or in accord with the Constitution.

The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law.

The Sixth Amendment guarantees to the accused in a criminal prosecution the right to a speedy and public trial by an impartial jury.

The Fourteenth Amendment guarantees that no state shall deprive any person of life, liberty, or property without due process of law.

The guarantee to all persons accused of capital criminal offenses of the right to a trial by an impartial jury presents to This Honorable Court the main question upon which petitioner relies for a review of the Federal question which was erroneously decided by the Court of Appeals of Kentucky.

The right of an accused to a trial by an impartial jury has been denied petitioner and this is so whether the defect is discovered before or after the verdict.

It is the contention of the petitioner that the statement made by juror McClanahan clearly manifested a secret bias and prejudice such as to deny petitioner has

right to a trial by an impartial jury and such bias or prejudice may be raised when it is discovered either before or after the trial.

It is important to note that the statements attributed to juror McClanahan which he did not deny making were made before the trial, even before McClanahan was chosen to serve on the petit jury which returned a verdict of 15 years for voluntary manslaughter. These statements, though made before the trial, were discovered by defense counsel overhearing a conversation on the street after the trial between two persons who had talked to and heard juror McClanahan make the statements which indicated his bias and prejudice which could not be set aside regardless of what juror McClanahan swore he would do. Therefore, this bias and prejudice is such as to deny petitioner his right to a trial by an impartial jury as a matter of law.

This bias and prejudice could not have been discovered on *voir dire* examination because the juror made the statement under oath that he could set aside his opinion as to the guilt or innocence of petitioner and try the case on the facts as they were presented. This qualifies the juror by law in Kentucky. However, the statements made by juror McClanahan indicate he did not try the petitioner on the facts as presented in the trial, rather by juror McClanahan's own statements, which he did not deny, juror McClanahan "sent him to prison for things he had done in the past."

Petitioner further contends that he was denied due process of law when the jury was placed in the custody of Sheriff Hall, a witness who had testified against pe-

titioner. To permit Sheriff Hall to remain close to the jury throughout the course of deliberations was to create a silent influence on the jury. Sheriff Hall is the same man who arrested Gordon Levi on the open charge at 12:00 P.M. the night of the killing. He therefore had a personal interest in the outcome of the trial and it was a denial of petitioner's right to a fair and impartial trial to permit such a person to take custody of the jury when it retired for deliberations.

This is apparent when the jury communicated with the Court by note which was carried from the jury room to the judge's chambers by this same Sheriff Hall. Certainly it is altogether possible that some off-hand comment or facial gesture could have been communicated to the jury and had an influence on the outcome. Certainly with all the officers of the Court who are available someone other than the arresting officer who testified against the petitioner could have taken custody of the jury and prevented the silent remainder from participating in the jury process.

In *United States, ex rel De Vita* v. *McCable,* District Court, New Jersey, July 14, 1955, 133 Fed. Supp. 169 at page 176, the Court states there is no doubt that a trial by impartial jurors is a fundamental right. The *De Vita* case, *supra,* raises the issue of bias but decides there was no bias. In the case at bar petitioner contends there existed such bias. More importantly, juror McClanahan did not reveal this bias on *voir dire* examination.

The disqualification of a juror which entitles petitioner to a new trial was not discovered until after the

verdict. This disqualification meets three tests as set down in the *De Vita* case, *supra*. First, the later discovered information is a disqualification, being that juror McClanahan could not try the petitioner on the evidence as produced in Court. Second, bias is shown and indicated. Third, the juror intentionally concealed the information when he responded he could set aside the opinion as to guilt or innocence and try the petitioner on the evidence as produced in Court. This statement is a direct contradiction to the statements made to Mr. Johnson and Mr. Florence.

In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

In re *Oliver*, 333 U. S. 257, 68 S. Ct. 499, 92 L. Ed. 682; *Turner* v. *Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. Ed. 749.

In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn," Co. Litt., 155B. His verdict must be upon the evidence based at the trial.

This was written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807):

> "Light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constiute no sufficient objection to a juror, but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them,

which will combat that testimony and resist its force, do constitute a sufficient objection to him."

"The theory of the law is that a juror who has formed an opinion cannot be impartial."

Reynolds v. *United States*, 98 U. S. 145, 25 L. Ed. 244, 246.

In the case at bar, the juror had formed an opinion and expressed it. This is such an opinion as to clearly indicate a bias and prejudice which makes the juror incompetent.

While petitioner does not question the validity or constitutionality of the state law which permits a juror to serve after he swears to set aside his opinion and try the case on the evidence as produced in the Court, the rule "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California*, 314 U. S. 219, 236, 86 L. Ed. 166, 180, 62 S. Ct. 280.

The test as presented in *Reynolds* v. *United States*, 98 U. S. 145, 155, 25 L. Ed. 244, is "whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact."

The contention of petitioner on the basis of the expressed opinion of juror McClanahan not discovered until after the trial is that he was denied due process of law as guaranteed by the Fourteenth Amendment in that petitioner did not receive a trial by "impartial jurors."

As Chief Justice Hughes observed in *United States* v. *Wood,* 299 U. S. 123, 145, 146, 81 L. Ed. 78, 87-89, 57 S. Ct. 177:

> "Impartiality is not a technical conception. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In the case of *Ness* v. *Cunningham,* January, 1963, 313 F. 2d 929, the Court restated the well established rule that the "right of an accused to be present at every stage of his trial for a felony especially where capital punishment is involved, is so fundamental that the right may not be waived." In the case at bar the Court and attorneys made the decision in the absence of petitioner. The petitioner contends that allowing any person, especially the arresting officer under the facts of the case at bar, to communicate with the jury out of the presence of the petitioner, the judge and all the attorneys affected petitioner's basic rights.

CONCLUSION.

Petitioner respectfully submits that juror McClanahan was incompetent to serve on the jury after his expressed opinion that he "would send him (petitioner) to prison for things he has done in the past."

The manifested prejudice is proved by two disinterested persons subpoenaed to verify the statement made by juror McClanahan. Juror McClanahan did not deny that he made the statement, merely saying he

could not remember whether he had made the statement or not. The undisputed fact is that juror McClanahan made the statement, which makes him incompetent to serve as a juror.

The conviction by an incompetent juror is a denial of petitioner's Constituional right to an impartial trial.

Petitioner further contends that the cumulative effect of permitting the arresting officer who testified against petitioner to take custody of the jury when it retired for deliberations; the use of the arresting officer as a courier between the jury and the judge not in the presence of petitioner; and the fact that one of the jurors was as a matter of law bias and prejudiced against petitioner as a result of his expressed opinion against petitioner effectively denied petitioner due process of law and his fundamental right to a trial by a fair and impartial jury.

For this reason, and the other reasons heretofore mentioned, petitioner respectfully submits that this Court ought to grant a review of his case.

Respectfully submitted,

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